Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT
OF THE UNITED STATES

SYED M. A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT
OF LABOR,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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50 PP

QUESTIONS PRESENTED

In the proceeding below, the United States Court of Appeals for the Tenth Circuit held that the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851(b)(3), allowed the Secretary of Labor to dismiss an employment discrimination complaint, prior to discovery being had, on the grounds that the complainant failed to allege all of the elements of a *prima facie* case of employment discrimination.

In light of the broad remedial purpose of the ERA and Congress's intent that § 5851(b)(3) limit only the investigative stage of a proceeding thereunder, the Tenth Circuit's decision raises the following questions:

(1) Whether the so-called "gate keeping" provision, 42 U.S.C. § 5851(b)(3) applies to the *de novo* review stage before a Department of Labor administrative law judge; and

(2) Whether an ERA complaint may be dismissed for failure to allege the elements of a *prima facie* case prior to the complainant being afforded any discovery.

STATEMENT AS TO THE PARTIES

Pursuant to Sup. Ct. R. 14(1)(b), the petitioner makes the following statement. The petitioner, Mr. Hasan, was a complainant under the ERA in proceedings below before the Department of Labor, and was the petitioner in proceedings before the Tenth Circuit to review the Department of Labor's resultant decision.

The respondent, Department of Labor, was the adjudicative body which heard Mr. Hasan's complaint in an administrative proceeding, and was the respondent in proceedings before the Tenth Circuit.

Wolf Creek Nuclear Operating Corporation was the defendant in Mr. Hasan's case before the Department of Labor, and was an intervenor in the proceedings before the Tenth Circuit to review the Department of Labor's decision. Wolf Creek is not a party to this proceeding.

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OPINIONS BELOW

The Petitioner in this case, Mr. Syed M.A. Hasan, proceeding *pro se*, filed an employment discrimination complaint with the Occupational Health and Safety Administration ("OSHA") Wage and Hour Division on November 18, 1999.

On October 5, 2000, a Department of Labor Administrative Law Judge ("ALJ") issued a Recommended Decision and Order, denying Mr. Hasan's complaint. The ALJ's decision is reported as *Hasan v. Wolf Creek*, 00-ERA-14 (ALJ Oct. 5, 2000), and is reproduced herein at Appendix, p. A18.

Mr. Hasan perfected an appeal from the ALJ decision to the Department of Labor's Administrative Review Board ("ARB") and, on May 31, 2001, the ARB issued its Final Decision and Order upholding the ALJ's dismissal of Mr. Hasan's complaint. The ARB's decision is reported as *Hasan v. Wolf Creek*, 00-ERA-14 (ARB May 31, 2001), and is reproduced herein at Appendix, p. A9.

Mr. Hasan then timely petitioned the United States Court of Appeals for the Tenth Circuit for review of the ARB's Final Decision and Order. On April 26, 2002, a panel of the Tenth Circuit issued its decision upholding the ARB's Final Decision and Order. The Tenth Circuit's decision is reported as *Hasan v. Department of Labor*, 298 F.3d 914 (10th Cir. 2002), and is reproduced herein at Appendix, p. A1.

Following the Tenth Circuit panel's decision, Mr.

Hasan timely petitioned for rehearing and/or rehearing *en banc* and, on July 16, 2002, Mr. Hasan's petition was denied. The Tenth Circuit's one-page order denying rehearing is reproduced herein at Appendix, p. A25.

STATEMENT OF JURISDICTION

After a panel of the Tenth Circuit denied Mr. Hasan's petition for review of an order of the ARB on April 26, 2002, Mr. Hasan timely petitioned for rehearing and/or *en banc* rehearing. On July 16, 2002, a panel of the Tenth Circuit denied Mr. Hasan's rehearing petition.

This Petition for Writ of *Certiorari* is filed within 90 days of the Tenth Circuit's July 16, 2002 order denying Mr. Hasan's rehearing petition. This Petition is thus timely under Supreme Court Rule 13.1, and the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves provisions of the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851 *et seq*. Subsection (a) of the ERA makes it unlawful for any covered employer to retaliate against an employee for engaging in protected activity as defined in the Act. In relevant part, the ERA states:

(b) Complaint, filing and notification:

(1) Any employee who believes he has been discharged or otherwise discriminated against by any person in violation

of subsection (a) of this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the (Nuclear Regulatory) Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this sub-paragraph. Within ninety days of receipt of such complaint, the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such a violation, issue an order either providing the relief prescribed by sub-paragraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing.

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(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a *prima facie* showing that any of the behavior described in sub-paragraphs (A) through (F) of sub-section (a)(1) of this section was a contributing factor in the unfavorable personnel action alleged in the complaint.

STATEMENT OF THE CASE

A. Statutory and Administrative Scheme.

This case arises under the whistleblower protection and anti-retaliation provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 *et seq.*, and the Secretary of Labor's ("Secretary's") implementing regulations governing the conduct of whistleblower proceedings, 29 C.F.R. Part 24.

Under the ERA, once a complainant files a complaint with the Occupational Safety and Health Administration ("OSHA"), OSHA is required to conduct an investigation into the complainant's claims. 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.5. However, the ERA provides that the Secretary "shall not conduct the investigation . . . unless the complainant has made a *prima facie* showing" that the respondent's adverse action "was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. § 5851(b)(3).

The Secretary's implementing regulations take this so-called "gate keeping" provision into account, with respect to OSHA investigations under the ERA, and provide that:

> (b)(1) A complaint of alleged violation shall be dismissed unless the complainant has made a *prima facie* showing that protected behavior or conduct as provided in Sec. 24.4(b) was a contributing factor in the unfavorable personnel action alleged in the complaint.

- - -

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to meet the required elements of a *prima facie* case, as follows:

(i) the employee engaged in protected activity or conduct, set forth in Sec. 24.2;

(ii) the respondent knew that the employee engaged in the protected activity;

(iii) the employee has suffered an unfavorable personnel action; and

(iv) the circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action.

29 C.F.R. § 24.5(b)(1) - (b)(2).

The Secretary's regulations further state:

> For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required elements of a *prima facie* case

29 C.F.R. § 24.5(b)(3).

If the OSHA investigation results in an unfavorable decision for the employee, the employee is entitled to a *de novo* review of his or her claim before the DOL's Office of Administrative Law Judges. 42 U.S.C. § 5851(b)(2)(A); 29 C.F.R. § 24.4(d)(3); § 24.6.

Once the complainant's case has passed from the OSHA investigatory stage to the OALJ adjudicatory stage, the Secretary's regulations in Part 24.5, which discuss making a *prima facie* showing on the face of the complaint, no longer apply, as they apply only to the investigative stage in ERA cases. *See, e.g.* 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998) (explaining scope of newly-promulgated regulations).

Significantly, at the OALJ adjudicatory stage, the complainant's only burden is to comply with the ERA's general requirement that the complainant ultimately must make a *prima facie* showing. 42 U.S.C. § 5851(b)(3).

B. Facts and Procedural Background.

The petitioner in this case, Mr. Hasan, is a highly-qualified senior structural engineer, with over twenty years of experience in the nuclear industry.

In late 1999, Wolf Creek Nuclear Operating Corporation ("Wolf Creek"), an NRC licensee covered by the ERA's whistleblower protection provisions, was actively seeking to fill openings within its organization for structural engineers.

On November 6, 1999, in response to Wolf Creek's internet advertisement for engineers, Mr. Hasan submitted to Wolf Creek an application and personal resume, seeking a position as a structural engineer. To be "up front" with Wolf Creek, Mr. Hasan noted in his cover letter that he had, in the past, blown the whistle on "safety related design problems" by reporting them to the Nuclear Regulatory Commission. *See* R. 18.[1] Needless to say, Wolf Creek refused to hire Mr. Hasan.

After Wolf Creek refused to hire him, Mr. Hasan, proceeding *pro se*, filed a complaint with OSHA, dated November 18, 1999. Among other things, the DOL regulations allow for pleadings to be supplemented by way of a complainant's subsequent filings or responses to the respondent's filings, *see, e.g. Ruud v. Westinghouse*, No. 88-ERA-33, D&O of Remand, pp. 13-15 (ARB Nov. 10, 1997), so Mr. Hasan was entitled to supplement his pleadings at a later time.

In his complaint, Mr. Hasan alleged, *inter alia*, that: (1) he was a whistleblower who had engaged in protected conduct; (2) Wolf Creek took adverse action against him by refusing to hire him; and (3) Wolf Creek refused to hire him because of his protected conduct.

Shortly after filing his claim, Mr. Hasan supplemented his complaint by way of letter to OSHA, dated November 29, 1999. Therein, he alleged that: (1)

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1 The letter "R" followed by a number corresponds with the document given that number in the Department of Labor's certified list of documents, which formed the record before the Tenth Circuit below.

Wolf Creek had an open position for which he was qualified; (2) he applied for the position; and (3) his protected activity is "well known to Wolf Creek Nuclear Operating Corporation."

Mr. Hasan later repeated these allegations in two supplemental filings before the ALJ. In fact, he specifically re-alleged that Wolf Creek had a "good amount of work available for an engineer of my caliber, especially when I am willing to work for the above respondent at any location, for any shift, for any position and for any salary that the above respondent deems fit." In the same filing, Mr. Hasan noted to the ALJ that he had served discovery requests upon Wolf Creek, but that Wolf Creek had not complied with those requests.

Without ever complying with Mr. Hasan's discovery requests, Wolf Creek filed with the ALJ a motion to dismiss Mr. Hasan's complaint. R. 5. The ALJ ordered Mr. Hasan to show cause why Wolf Creek's motion should not be granted, R. 11, and, on May 22, 2000, Mr. Hasan submitted his response. R. 12.

Therein, Mr. Hasan again repeated his allegations against Wolf Creek. Specifically, he referred the ALJ to his initial and supplemental complaints, and re-alleged that Wolf Creek refused to hire him and hired others instead:

> The fact remains that I did apply to the respondent, in response to an internet advertisement, for a job (civil/structural engineer). . .*Other people have been hired.* This is positive proof of the substantiation of

my claim.

R.12, p. 6 (emphasis supplied).

Without scheduling a hearing or compelling Wolf Creek to comply with Mr. Hasan's discovery requests, and without actually holding a hearing, the ALJ issued a Recommended Decision and Order, on October 5, 2000, dismissing Mr. Hasan's claim. *See* App., p. A18.

Therein, keeping in mind that Mr. Hasan was afforded no discovery, the ALJ set forth the incongruous statement that "Complainant has the initial burden of proof in an environmental whistleblower proceeding to make a *prima facie* case. . ." App., p. A20. Applying that standard, the ALJ held that the third element of a *prima facie* case of discriminatory failure to hire requires a showing that "the position remained open and respondent continued to seek applicants of complainant's qualifications." App., p. A22.

In order to satisfy that element, the ALJ held, Mr. Hasan must "show that one or more employees" of the respondent knew of his protected activity. *Id.* The ALJ did not address Mr. Hasan's express claim that his protected activity is "well known to Wolf Creek," but rather held that Mr. Hasan's complaint should be dismissed because "Complainant does not allege this." App., p. A22.

Mr. Hasan timely appealed the ALJ's decision to the Department of Labor's ARB. On review, the ARB upheld the ALJ's dismissal of Mr. Hasan's complaint, specifically finding that Mr. Hasan failed to sufficiently allege that "the position remained open and the employer continued to seek

applicants with his qualifications." App., p. A14-A15.

Mr. Hasan timely petitioned the Tenth Circuit for review of the ARB's decision and, on April 26, 2002, a three-judge panel affirmed the ARB's decision. In its decision, the panel overturned the ARB's finding that Mr. Hasan had failed to sufficiently allege that Wolf Creek knew of his prior protected activity. The panel held that Mr. Hasan's application, which on its face recounted his past protected activity, was sufficient "to suggest an inference that the official knew of Mr. Hasan's protected activity." *See* App., p. A5.

However, the panel further held that "Mr. Hasan cannot meet the third element, as he did not sufficiently allege that respondents took some adverse action against him because of his protected activity." App., p. A6. Accordingly, the panel affirmed the ARB's dismissal of Mr. Hasan's complaint, solely on the ground that Mr. Hasan failed to fully plead a sub-element of the employment discrimination *prima facie* case. *See* App., p. A6 ("he did not sufficiently allege that respondent took some adverse action . . .") (emphasis supplied).

That decision conflicts with this Court's most recent ruling on the rules of pleading. In order to effectuate Congress' intent that the nuclear and environmental whistleblower laws be broadly construed to protect the public interest, this Court should grant *certiorari* and review the Tenth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION OF FEDERAL LAW.

A. The Tenth Circuit's Heightened Pleading Requirement is Improper.

The Tenth Circuit's decision in this case raises an important question of federal law. First, while the precise issue under the ERA has not been decided, the Tenth Circuit's decision conflicts with the pleading principles set forth by this Court, just last term, in *Swierkiewicz v. Sorema*, 534 U.S. 506, 122 S.Ct. 992 (2002).

Swierkiewicz involved a district court's dismissal of a plaintiff's Title VII claims on the grounds that the plaintiff failed to adequately state all of the elements of a *prima facie* case of employment discrimination. In that case, the district court found that the plaintiff had not "adequately alleged circumstances to support an inference of discrimination." *Swierkiewicz*, 122 S.Ct. at 996. The Court noted a division among the Courts of Appeals "concerning the proper pleading standard for employment discrimination cases," *id.*, and granted *certiorari*.

Upon review, this Court noted that the *prima facie* case of employment discrimination represents an evidentiary standard, not a pleading requirement, *Swierkiewicz*, 122 S.Ct. at 997, and further noted that it is improper to require a plaintiff to plead with specificity all of the elements of a *prima facie* case, because the *prima facie* case set forth set

forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-804 (1973), does not apply in all cases. *Id.*

Moreover, the Court concluded, a rule requiring a plaintiff to plead with specificity each element of a *prima facie* case conflicts with the reality that:

> the precise requirements of the *prima facie* case can vary depending on the context and were never intended to be rigid, mechanized or ritualistic. Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required *prima facie* case in a particular case. Given that the *prima facie* case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Id., 122 S.Ct. at 997-998 (internal citations omitted).

Though the courts have frequently confused the purpose of the *prima facie* case in the past, this Court's decision in *Swierkiewicz* makes clear that it is improper to require a plaintiff to plead specific facts in support of each element of the *prima facie* case – especially without affording the plaintiff discovery.

Here, the Tenth Circuit panel did exactly what this Court rejected in *Swierkiewicz*, and judged the qualitative value of Mr. Hasan's allegations, which were made without the aid of discovery. The panel found them insufficient to state a claim under the third prong of the "failure to hire"

test set forth by the Tenth Circuit in its other employment discrimination decisions. Significantly, that element is not mentioned in the ERA.

The panel expressly held that Mr. Hasan "cannot meet the third element as he did not *sufficiently allege* that respondent took some adverse action against him because of his protected activity," App., p. A6, and that "Mr. Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him." App., p. A6. This Court thus needs go no further; the panel's conclusions facially violate the principle articulated by this Court in *Swierkiewicz*.[2]

The panel justifies its conclusion with the argument that the fact Mr. Hasan was afforded no discovery is really inconsequential, because his allegations were conclusory and his discovery requests were misplaced anyway. *See, e.g.* App., p. A6.

Significantly, under the principle articulated in *Swierkiewicz*, even if Mr. Hasan's allegation was "conclusory" and limited to the statement cited by the panel,

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2 Significantly, the DOL has fully adopted the Title VII framework, as articulated in *McDonnell Douglas*, to define a *prima facie* case under the ERA. *See Samodurov v. Niagara Mohawk*, No. 89-ERA-20, Decision and Order (Sec'y. Nov. 16, 1993). As such, the ARB is bound by *Swierkiewicz*.

that allegation would be sufficient to survive a motion to dismiss, for *Swierkiewicz* holds that there is no heightened pleading requirement, and that "an employment discrimination complaint need not contain *specific facts* establishing a *prima facie* case." *Swierkiewicz*, 122 S.Ct. at 995.

It is unclear how Mr. Hasan could possibly be expected to allege any more without being afforded the opportunity to learn additional facts in discovery. The fact is, however, Mr. Hasan did request relevant material in discovery. As the panel noted, Mr. Hasan had applied for a "civil/structural engineering position," App., p. A6, and he requested in discovery the "names, qualifications and experience of all civil/structural/pipe support engineers working for respondent." App., p. A6.

These requests go directly to the element on which the panel found Mr. Hasan's allegations lacking. Put simply, the "names" and "experience" of Wolf Creek's civil, structural and pipe support engineers would show which engineers were hired at what time – facts which would allow Mr. Hasan to ultimately prove that Wolf Creek hired engineers after he applied for and was denied a position.

As Judge Easterbrook of the Seventh Circuit stated, in a case this Court cites with approval in *Swierkiewicz*, "all a complaint has to say" in a race-based employment discrimination case, for example, is "I was turned down for a job because of my race." *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). The same holds here: all Mr. Hasan had to say was that he was denied a job because of his whistleblowing.

That statement would fully comply with the ERA, 42 U.S.C. ' 5851(b)(3)(B), which only requires a complainant to make a "*prima facie* showing" that his protected activity was a "contributing factor in the unfavorable personnel decision alleged in the complaint."

Significantly, as set forth *supra*, the ERA "gate keeping" function applies only to the investigatory stage, and not the adjudicatory stage. *See, e.g. Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997); 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998) (provision a "limitation on the investigative authority of the Secretary of Labor").[3] As such, there is simply no heightened pleading requirement at the *de novo* review stage of an ERA proceeding before a Department of Labor ALJ. Accordingly, the Tenth Circuit's decision to the contrary is highly erroneous.

B. The Tenth Circuit Rule Raises an Important Question of Federal Law.

It is well-settled that Congress intended the ERA to promote public health and safety by providing a safe haven for whistleblowers to report threats thereto. *See, e.g. English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270 (1990). The courts have long held that Congress intended the ERA to be broadly-construed, *see, e.g. DeFord*

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3 The cases are not directly on all fours, but to the extent the Tenth Circuit's decision in this case applied the so-called "gate keeping" function to the adjudicatory stage of an ERA proceeding, it creates a division in the circuits, as the Eleventh Circuit recognized in *Stone & Webster* that the function applies to the investigative stage.

v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983); *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3d Cir. 1992), so as to effectuate its remedial purpose, *see, e.g. Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

In accordance with this underlying philosophy, the courts have noted that the employee protection provisions in the nuclear and environmental statutes truly "represent the public interest." *See Beliveau v. Department of Labor*, 170 F.3d 83, 87-88 (1st Cir. 1999).

The Tenth Circuit's decision completely vitiates the Congressional purposes behind the principles these courts have articulated. To wit, in its mis-application of the federal pleading rules, which the ARB has adopted, the Tenth Circuit has construed the ERA narrowly and has effectively taken away the safe haven the ERA was intended to create for nuclear whistleblowers.

Given that the ARB oversees the adjudication of claims under all of the environmental and nuclear employee-protection laws, and uses the same rules of pleading and *McDonnell Douglas*-type burden-shifting schemes in all of its employment discrimination cases, this new rule will have broad application.

That broad application highlights the importance of the question raised by the Tenth Circuit's rule. For, without the safe haven provided by laws like the ERA, would-be whistleblowers will be less likely to even bring ERA claims for fear of having no real remedy.

For all but the bravest, then, the Tenth Circuit's ruling will have a chilling effect. As the various Courts of Appeals have noted, *supra*, it is in the public interest for whistleblowers to report suspected health and safety violations. The chill cast by the Tenth Circuit's decision thus has the potential to severely harm the public interest by reducing the number of whistleblowers who are willing to come forward.

This Court can protect the public interest – and can restore the ERA's safe haven as Congress intended – by granting *certiorari* and overturning the Tenth Circuit for its failure to abide by the pleading principles articulated in *Swierkiewicz*.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari* and review the Tenth Circuit's decision in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

ORDER

Filed July 26, 2002

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

This matter is before the court on Winston & Strawn's motion to publish the order and judgment filed on April 26, 2002. The motion is granted. A copy of the published opinion is attached to this order.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

United States Court of Appeals
Tenth Circuit

APR 26 2002

PATRICK FISHER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

PETITION FOR REVIEW
OF AN ORDER OF THE UNITED STATES
DEPARTMENT OF LABOR
(No. 01-006)

Submitted on the briefs:

Syed M.A. Hasan, pro se.

Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, and Lois R. Zuckerman, Attorney, U.S. Department of Labor, Washington, D.C., for Respondent.

Warren B. Wood, of Wolf Creek Nuclear Operating Corporation, Burlington, Kansas, and J. Patrick Hickey and Tiffany L. Powers of Shaw Pittman LLP, Washington, D.C., for Intervenor.

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

In 1999, petitioner Syed M.A. Hasan applied for a position with respondent Wolf Creek Nuclear Operating Corporation as a civil/structural engineer.(1) He stated he was willing to work anywhere in the United States or overseas at any salary respondent considered reasonable. In his application letter, Mr. Hasan also informed Wolf Creek that he had found it necessary to contact the United States Nuclear Regulatory Commission about safety problems he had encountered in a previous position. When he had not heard from Wolf Creek within two weeks, Mr. Hasan filed this complaint, pursuant to 42 U.S.C. § 5851, with the Occupational Safety and Health Administration (OSHA)

alleging Wolf Creek had refused to hire him in retaliation for his prior whistleblowing activities. After OSHA found no merit to his complaint, his case was referred to an administrative law judge (ALJ) for(1) disposition. The ALJ recommended dismissing the action for failure to state a claim. The **Administrative Review Board** (ARB) accepted the recommendation. Mr. Hasan then filed this petition for review.(2)

In his petition for review, Mr. Hasan argues that the ARB's decision was illegal because the ARB did not review the entire record. Mr. Hasan also contends he was denied discovery and Wolf Creek did know of his prior protected activities when he was denied employment.

In reviewing the agency's decision, we examine whether the agency "(1) acted within the scope of [its] authority, (2) complied with prescribed procedures, and (3) took action that was neither arbitrary and capricious, nor an abuse of discretion." *Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1231 (10th Cir. 2000) (citation omitted). "We review matters of law *de novo*." *Id.* (quotation omitted).

The Energy Reorganization Act prohibits employers from discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). Congress amended § 5851 of the Act in 1992 to include a gatekeeping function which prohibits the Secretary from investigating a complaint unless the complainant establishes a prima facie case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. *See* § 5851(b)(3)(A); *see also Trimmer v. United States Dep't of Labor*, 174 F.3d 1098, 1101 (10th Cir. 1999).

To determine whether Mr. Hasan could proceed beyond the § 5851(b)(3) barrier, the ARB examined whether (1) he "engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action." R. 23 at 4. The third element is subdivided into three prongs. The complainant "must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position remained open and the employer continued to seek applicants with his qualifications."(3) *Id.* at 5.

The ARB determined that Mr. Hasan had established the first element, but could not establish the remaining elements. As to the second element, Mr. Hasan argues he did establish that the person who made the decision not to hire him was aware of his prior whistleblowing activities because he had included that fact in his application letter. We agree. The ARB concluded that Mr. Hasan had only speculated that the hiring official must have known of his protected activity. The ARB further supported its conclusion citing to a case Mr. Hasan had filed against a different prospective employer wherein the hiring official averred he had not seen Mr. Hasan's application letter. However, Mr. Hasan sent his application letter in which he set forth his prior whistleblowing activities to respondent. Mr. Hasan need not further allege that the official in charge of hiring saw that letter; the pleaded facts are sufficient to suggest an inference that the official knew of Mr. Hasan's protected activity.

While we cannot affirm the ARB's determination on this element, Mr. Hasan still cannot proceed past the

gatekeeping barrier. Mr. Hasan cannot meet the third element as he did not sufficiently allege that respondent took some adverse action against him because of his protected activity. The ALJ determined that Mr. Hasan had sufficiently alleged that he applied for and was qualified for a job for which respondent was seeking applicants and despite his qualifications, he was rejected. The ALJ concluded, and the ARB affirmed, however, that Mr. Hasan had not sufficiently alleged that after his rejection, the position remained open and respondent continued to seek applicants with his qualifications.

The record shows that Mr. Hasan applied for any senior civil/structural engineering position at any salary in any location for which he was qualified. Mr. Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him. He merely made the conclusory statement that a company the size of respondent's always has positions open. This statement is insufficient to establish the third prong.

Further, none of the discovery Mr. Hasan sought was directed towards meeting this prong. Mr. Hasan sought discovery of all documents in respondent's possession which in any way concerned or mentioned him as well as reports of all verbal contacts with anyone about him. He sought the names, qualifications and experience of all civil/structural/pipe support engineers working for respondent as well as all contractors, subcontractors, and architectural and engineering firms contracting with respondent in all locations. Finally, he sought all information about any of respondent's employees or other job applicants who had filed **whistleblower** complaints. *See* R. Mot. for Protective Order, Ex. 1. None of this

information would establish that respondent hired someone with Mr. Hasan's qualifications to fill an open position or that respondent continued to seek someone with Mr. Hasan's qualifications for an open position. Thus, the ARB's decision to dismiss this action prior to discovery did not affect Mr. Hasan's ability to state a viable claim.

As Mr. Hasan could not meet the required § 5851 gatekeeping elements, the ARB's action was neither arbitrary and capricious, nor an abuse of discretion. *Wyo. Farm Bureau Fed'n*, 199 F.3d at 1231. The ARB properly dismissed this complaint. The petition for review is DENIED.

[ENDNOTES]

(1) Mr. Hasan also applied for and failed to obtain a position with Wolf Creek in 1994. Although he included facts stemming from the 1994 application in his complaint, he indicated in his brief before the ARB and to this court that his purpose for including the 1994 information was solely for background evidence for his 1999 rejection, rather than to affirmatively state a claim for relief on the 1994 rejection. We, therefore, do not address the timeliness of any claim relating to the 1994 application and subsequent rejection.

(2) After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

(3) Mr. Hasan does not challenge the Secretary's delineation of the elements of a prima facie case. We are concerned, however, that the Secretary's articulation of the third prong is too limited. See Amro v. Boeing Co., 232 F.3d 790, 796

&n.2 (10th Cir. 2000) (clarifying that plaintiff may establish this element in a number of ways including that position for which he was not hired *was filled or remained open* following rejection of the plaintiff's application). In our discussion, we address both possibilities.

***Hasan v. Stone & Webster Engineers & Constructors, Inc.*, ARB No. 01-006, ALJ No. 2000-ERA-14 (ARB May 31, 2001)**

U.S. Department of Labor	Administrative Review Board 200 Constitution Avenue, N.W. Washington, D.C. 20210

ARB CASE NO. 01-006
ALJ CASE NO. 2000-ERA-14
DATE: May 31, 2001

In the Matter of:

SYED M.A. HASAN,
COMPLAINANT,

v.

WOLFE CREEK NUCLEAR OPERATING CORP.,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD[1]

Appearances:

For the Complainant:
Syed M.A. Hasan, *pro se,*
Madison, Alabama

For the Respondent:
J. Patrick Hickey,
Shaw Pittman, Washington, D.C.

FINAL DECISION AND ORDER
BACKGROUND

This case arises under the employee protection provisions of the Energy Reorganization Act ("ERA"), which prohibit an employer from discriminating against or otherwise taking unfavorable personnel action against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in protected whistleblowing activity. 42 U.S.C.A. §5851 (West 1995). This case is one of many that Complainant Syed Hasan has filed against various companies for failing to hire, retain, or rehire him.[2]

[Page 2]

According to Hasan, he applied for a job with Respondent as a "civil/structural/pipe support engineer" in December 1994, on June 11, 1999, and on November 6, 1999. As part of his November 6, 1999 application, Hasan informed Respondent that he has a history of whistleblowing activity. When he did not receive a favorable reply to his application by November 18, 1999, Hasan filed a complaint with the Occupational Safety and Health Administration ("OSHA")[3] alleging that Respondent refused to hire him because he was a whistleblower. OSHA found no merit to Hasan's complaint. Hasan objected to that determination, and the case was referred to an Administrative Law Judge ("ALJ") for disposition.

After participating in discovery, Respondent advised the ALJ that Hasan's complaint was time-barred with regard to the 1994 application because it was not filed within 180 days of the alleged violation as required by the ERA. Respondent also asserted, among other things, that:

In order to survive a pre-hearing Motion to Dismiss for failure to state a claim, it is not enough for the Complainant to simply state that he remained unemployed after submitting a resume to the employer. Rather the Complaint must allege with sufficient specificity that the Complainant applied for a particular opening for which he was qualified and that after such rejection, the position remained open and the employer continued to seek applicants from among those persons with his qualifications.

Respondent's Memorandum of Law in Support of Its Motion to Dismiss at 6-7. Therefore, Respondent moved to dismiss the complaint because it was untimely filed with regard to the 1994 application and because it failed to allege essential elements of a *prima facie* case concerning the 1999 applications. *Id.*

Hasan opposed the motion to dismiss asserting that he submitted his application in response to an advertisement on the internet. However, Hasan did not allege that his complaint with regard to the 1994 application was timely. He also did not allege that the position for which he applied in 1999 remained open and that Respondent continued to seek applicants from among those persons with his qualifications.

By Order dated April 20, 2000, the ALJ directed Hasan to show cause why his complaint should not be dismissed for failure to state a claim upon which relief could be granted. In his response, Hasan did not address the timeliness issue

nor did he assert that the position remained open and that Respondent continued to seek other applicants. Instead, he asserted, among other things, that Respondent was aware of his protected activities either through its counsel or through an employee that he identified only as "engineer H."

[Page 3]

The ALJ concluded that the complaint regarding the 1994 application was time-barred because it was filed beyond the 180-day time limit under the ERA. As to the 1999 applications, the ALJ found that Hasan had not asserted that the position in question remained open and that Respondent continued to seek applicants with his qualifications. In the absence of such allegation, the ALJ found that Hasan had failed to allege an essential element of a *prima facie* case. Additionally, the ALJ found that Hasan's case was further defective in that he had not alleged facts sufficient to establish that Respondent was aware of his protected activity. Specifically, the ALJ stated:

Complainant's statements, taken as true, do not amount to a prima facie case that Respondent had knowledge of Complainant's protected activity. Complainant does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity. The only people Complainant alleges to have knowledge of his protected activity is counsel for Respondent and "H", but he does not allege that either of these persons had any input in the hiring decisions of Respondent.

Consequently, by Order issued October 11, 2000 ("RD&O"), the ALJ recommended that the complaint be dismissed. This appeal followed.

JURISDICTION

We have jurisdiction pursuant to 42 U.S.C.A. §5851 and 29 C.F.R. §24.8.

STANDARD OF REVIEW

Under the Administrative Procedure Act, we have plenary power to review an ALJ's factual and legal conclusions *de novo*. See 5 U.S.C.A. §557(b) (West 1996); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000).

DISCUSSION

To state a claim under the ERA, the complainant must allege that: (1) the complainant engaged in protected conduct; (2) the employer was aware of that conduct; (3) the employer took some adverse action against him; and (4) there is evidence sufficient to raise an inference that the protected activity was the likely reason for the adverse action. *Carroll v. Bechtel Power Corp.*, No. 91-ERA-46, slip op. at 9 (Sec'y Feb. 15, 1995) (citing *Dartey v. Zack Co. of Chicago*, No. 82-ERA-2, slip op. at 7-8 (Sec'y Nov. 13, 1991), *aff'd sub nom, Carroll v. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996). *See also McCuistion v. TVA*, No. 89-ERA-6, slip op. at 6 (Sec'y Nov. 13, 1991); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

[Page 4]

In this case, Hasan alleged that, while working for another employer, he reported safety concerns to the Nuclear Regulatory Commission. That allegation is sufficient to establish the first element of a *prima facie* case. However,

he has not pled facts sufficient to establish the remaining elements.

To satisfy the second element, Hasan must allege that at least one of the employees responsible for, or having input in, the hiring practices of Respondent knew about his protected activity. *See Floyd v. Arizona Public Service Co.*, No. 90-ERA-39 (Sec'y Sept. 23, 1994). Rather than allege facts, Hasan merely speculated that either Respondent's counsel or "engineer H" informed the hiring officials of his protected activity.[4] According to Hasan, if the ALJ had granted him discovery and held a hearing, he would have been able to establish the facts in support of his claim.

Hasan must support his claim with more than mere speculation. As we have held before, a complainant cannot simply "file a conclusory complaint not well-grounded in fact, conduct a fishing expedition for discovery, and only then amend his complaint in order to finally set forth well-pleaded allegations." *Hasan v. Commonwealth Edison Co. and the Estes Group, Inc.*, ARB No. 00-028, ALJ No. 00-ERA-01, slip op. at 5 (ARB Dec. 29, 2000). Inasmuch as Hasan has not alleged that at least one of the employees responsible for making hiring decisions knew about his protected activity, he has not satisfied the second element of a *prima facie* case.

With regard to the third element, the Secretary has previously recognized that there are three factors that must be considered in determining whether a refusal to hire constitutes an adverse action. *Samodurov v. General Physics Corp.*, No. 89-ERA-20 (Sec'y Nov. 16, 1993). Under *Samodurov*, the complainant must allege: 1) that he applied and qualified for a job for which the employer was seeking applicants; 2) that, despite his qualifications, he was rejected; and 3) that after his rejection, the position

remained open and the employer continued to seek applicants with his qualifications. Although Hasan has alleged facts sufficient to satisfy the first two prongs of the *Samodurov* test, he has not alleged that, following his rejection, the position remained open and the employer continued to seek applicants with his qualifications. Thus, Hasan has failed to establish the third element of a *prima facie* case. In light of Hasan's failure to allege two essential elements of a *prima facie* case, we concur with the ALJ that this complaint should be dismissed.[5]

SO ORDERED.

CYNTHIA L. ATTWOOD
Member

RICHARD A. BEVERLY
Alternate Member

[ENDNOTES]

[1] This appeal has been assigned to a panel of two Board members, as authorized by Secretary's Order 2-96. 61 Fed. Reg. 19,978 §5 (May 3, 1996).

[2] *Hasan v. Florida Power & Light Co.,* ARB No. 01-004, ALJ No. 2000-ERA-12 (ARB May 17, 2001); *Hasan v. Sargent & Lundy*, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001); *Hasan v. Commonwealth Edison Co.,* ARB Nos. 01-002, 01-003; ALJ Nos. 2000-ERA-8, 2000-ERA-11 (ARB Apr. 23, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 01-005, ALJ No. 2000-ERA-13 (ARB Apr. 23, 2001); *Hasan v. Burns & Roe Enterprises, Inc.,* ARB No. 00-080, ALJ No. 2000-ERA-6 (ARB Jan. 30, 2001); *Hasan v. Commonwealth Edison Co.*, ARB No. 00-028, ALJ No. 2000-ERA-1, (ARB Dec. 29, 2000); *Hasan v.*

Intergraph Corp., ARB No. 97-016, ALJ No. 96-ERA-17, (ARB Aug. 6, 1997); *Hasan v. Bechtel Power Corp.*, No. 94-ERA-21 (Sec'y Mar. 16, 1995); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-40 (Sec'y Feb. 13, 1995); *Hasan v. System Energy Resources, Inc.*, No. 89-ERA-36 (Sec'y Sept. 23, 1992); *Hasan v. Nuclear Power Services, Inc.*, No. 86-ERA-24 (Sec'y June 26, 1991); *Hasan v. Stone & Webster Engineers and Constructors, Inc.*, ARB No. 01-007, ALJ No. 2000-ERA-10 (ALJ Oct. 5, 2000); *Hasan v. Sargent & Lundy,* No. 96-ERA-27 (ALJ Nov. 4, 1996); *Hasan v. Bechtel Power Corp.*, No. 93-ERA-22 (ALJ Dec. 8, 1994); *Hasan v. Nuclear Power Services Inc.*, No. 86-ERA-36 (ALJ July 27, 1989).

[3] OSHA is the agency within the Department of Labor ("DOL") charged with investigating ERA whistleblower complaints. See 29 C.F.R. §§24.4, 24.5 (2000).

[4] Hasan asserts on appeal that Respondent had to be aware of his protected activity because he disclosed it in his November 6, 1999 letter. However, Hasan did not raise this argument in response to the ALJ's show cause order. We decline to consider this argument for the first time on appeal and, instead, limit our review to the record established before the ALJ. Moreover, even accepting Hasan's statement, Hasan nevertheless failed to satisfy the second element of his *prima facie* case. An allegation that the Respondent must have known of his protected activity is insufficient, standing alone, to establish that one of the employees responsible for or having input in the decision to reject Hasan's application for employment knew about his protected activity. *Accord Hasan v. Burns & Roe Enterprises, Inc.*, ARB No. 00-080, ALJ No. 2000-ERA-6, slip op. at 5-7 & n.8 (ARB Jan. 30, 2001) (The complainant failed to establish a *prima facie* case where the hiring official averred that he did not see the letter in which the

complainant revealed his whistleblowing activities prior to making the decision not to hire the complainant.).

[5] Hasan has raised a number of other arguments in this case. The Board finds those arguments without merit and they do not warrant a separate discussion in this Order.

***Hasan v. Wolfe Creek Nuclear Operating Corp.*, 2000-ERA-14 (ALJ Oct. 5, 2000)**

U.S. Department of Labor
Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

DATE: OCTOBER 5, 2000

CASE NO.: 2000-ERA-14

In the Matter of:

SYED M. A. HASAN
Complainant

v.

WOLFE CREEK NUCLEAR OPERATING CORPORATION
Respondent

RECOMMENDED DECISION AND ORDER DISMISSING CLAIM

Procedural and Factual Background

The above-captioned case has not yet been scheduled for hearing. Respondent's counsel submitted a Motion To Dismiss on March 15, 2000. Respondent alleges that Complainant has failed to state a claim upon which relief can be granted. Complainant was ordered by this Court to show cause why his complaint should not be dismissed. On May 22, 2000 Complainant submitted his Response to Show Cause Order. Complainant failed to submit evidence to this Court which alleged any set of facts upon which relief could be granted.

Complainant filed the instant complaint on November 18, 1999, alleging violations of Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24. Specifically, Complainant alleged that he was not hired by Respondent, Wolf Creek Nuclear Operating Corporation because he had engaged in activities protected under the provisions of the ERA.[1] Complainant alleges that in December 1994, on June 11, 1999,[2] and November 6, 1999, he applied "for a job as a civil/structural/pipe support engineer" with Respondent. Approximately two weeks after Complainant applied for the position in 1999, he filed this complaint with the Secretary of Labor alleging discrimination and retaliation based on Respondent's failure to hire him.

[Page 2]

The complaint was investigated and found to have no merit by the Secretary of Labor on February 17, 2000. Complainant filed objections and requested a hearing before an Administrative Law Judge on February 23, 2000. The case was referred to the Office of Administrative Law Judges on February 28, 2000.

Applicable Law

Any employer who "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has: (1) Commenced or caused to be commenced...a proceeding under on of the Federal statutes listed in § 24.1(a)..." is deemed to have violated the federal law and regulations in Part 24. 29 C.F.R. § 24.2(b).

Neither 29 C.F.R. Part 24 (whistle blower proceedings) nor 29 C.F.R. Part 18 (procedures for administrative law judge hearings) address dismissal for failure to state a claim, therfore, the standards set out in the Federal Rules of Civil Procedure are applicable. Glenn v. Lockheed, 1998 ERA 35 and 50 (ALJ July 15, 1999). Under Federal Rule of Civil Procedure 12(b)(6), dismissal may be appropriate when the facts in the case fail to state a claim. Id. In considering whether a dismissal is appropriate, the facts alleged in the complaint are taken as true, and all reasonable inferences are made in favor of the non-moving party. If the factual allegations, after having been accepted as true and construed most favorably on behalf of the non-moving party, present a cognizable claim if proved by a preponderance of the evidence, dismissal is not proper. Jones v. City of Lakeland, Tennessee, 175 F.3d 410 (6th Cir. (Tenn.) 1999). However, failure to allege a prima facie case is grounds for immediate dismissal. See Lovermi v. Bell South Mobility, Inc., 962 F. Supp. 136, 139 (S.D. Fla. 1997); Briggs v. Sterner, 529 F. Supp. 1155, 1164 (S.D. Iowa 1981).

A. Elements and Burden of Proof

Complainant has the initial burden of proof in an environmental whistle blower proceeding to make a prima facie case which shows that: (1) complainant engaged in a

protected activity; (2) complainant was subjected to adverse action; (3) respondent was aware of the protected activity when it took the adverse action; and, (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. Glenn, 1998 ERA at 7. If Complainant has succeed in establishing the foregoing, Respondent must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. Frady v. Tennessee Valley Authority, 92-ERA-19 (Sec'y Oct. 23, 1995) The complainant bears the ultimate burden of persuasion that Respondent's reasons are not the true reasons for the adverse action, but a pretext for discrimination. Id. At all times, Complainant bears the burden of establishing by a preponderance of the evidence that the adverse action was in retaliation for the protected activity. Id.

[Page 3]

Complainant alleges that he engaged in a protected activity by his reporting of safety concerns to the United States Nuclear Regulatory Commission. Complainant has established the first element required to establish a prima facie case of retaliation.

The second requirement for a prima facie case of retaliation requires adverse action on the part of the Respondent. When determining whether a complainant has established an actionable adverse action in a failure to hire case, the framework of a prima facie case outlined in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) applies. Webb v. Carolina Power & Light Co., 93 ERA 42, 12 (ALJ July 24, 1996) ((aff'd, ARB August 26, 1997). In order to establish a prima facie case of discriminatory refusal to hire, the complainant must show: (1) that he applied and was qualified for a job for which the

employer was seeking applicants; (2) that, despite his qualifications, he was rejected; and (3) that, after his rejection, the position remained open and that employer continued to seek applicants from persons of complainant's qualifications. Id.

Complainant alleged in his March 15, 2000 Response to Respondent's Motion to Dismiss that he mailed his resume to Respondent in December, 1994, June 1999, and November 1999, in response to an Internet advertisement for a civil/structural engineer position. Complainant does allege the first element required to establish a prima facie case of discriminatory refusal to hire. Complainant further alleges the second element, that he was not hired by Respondent. However, Complainant does not allege the third element, that the position remained open and Respondent continued to seek applicants of Complainant's qualifications. As such, Complainant has not alleged a prima facie case of adverse action on the part of Respondent and has failed to meet the second requirement.

In satisfaction of the third requirement, Complainant alleges that he was not hired by Respondent in retaliation for engaging in a protected activity. To satisfy the third element, Complainant must show that one or more employees of Wolf Creek Nuclear Operating Corporation who had substantial input in the hiring decision had knowledge of the protected activity during the relevant time period. Id. at 6-7; Floyd v. Arizona Public Service Co., 90-ERA-39, 5 (Sec'y Sept. 23, 1994). Complainant does not allege this. In his November 18, 1999, complaint he alleged only that "[b]ased on my prior whistle blowing activities protected under ERA, WOLF CREEK NUCLEAR OPERATING COROPORATION is depriving me of my livelihood, FOR REFUSING TO HIRE ME, IN RETALIATION for reporting the safety concerns to the United States Nuclear

Regulatory Commission (NRC)...." Complainant, in his May 23 , 2000 Response to Respondent's Motion to Dismiss, states that counsel for Respondent, Mr. Hickey, has been representing Respondent and several other companies in ERA cases "for years" and that Complainant had filed other complaints against employers under the ERA.

Complainant further states that an engineer, "H", who is currently employed by Respondent, worked with Complainant at the Comanche Peak Nuclear Power Plant and "has to be aware" of his whistle blowing activities at Comanche Peak. In addition, Complainant states that his name was in the newspapers and is on the internet at the Office of Administrative Law Judges web site as suing companies for ERA violations.

Complainant's statements, taken as true, do not amount to a prima facie case that Respondent had knowledge of Complainant's protected activity. Complainant does not allege that any employee responsible for, or having input in, the hiring practices of Respondent had any knowledge of his protected activity. The only people Complainant alleges to have knowledge of his protected activity is counsel for Respondent and "H", but he does not allege that either of these persons had any input in the hiring decisions of Respondent. Complainant has failed to allege the third requirement for a prima facie case of retaliation.

The fourth requirement to allege a prima facie case of retaliation by Complainant is that there is sufficient evidence to raise a reasonable inference that the protected activity was the likely reason for the adverse action. Because Complainant has not alleged a prima facie case of adverse action or that Respondent had knowledge of the protected activity, he has not met this requirement.

After a careful review of the record, Complainant has failed to set forth a prima facie case of proscribed behavior, or provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation. 29 C.F.R. § 24.5(a)(2). In addition, Complainant's complaint, as pled, fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

B. Timeliness

Complainant's allegation of a discriminatory refusal to hire based on his December, 1994, application is time-barred. Under the ERA, Complainant must file a complaint within 180 days of the alleged violation. 42 U.S.C. § 5851 (b)(1). Complainant did not file the instant complaint until November 18, 1999. The statute of limitations bars this claim.

Accordingly,

ORDER

It is ORDERED that the Complaint of Syed M A. Hasan be, and is hereby, dismissed.

ROBERT J. LESNICK
Administrative Law Judge

RJL/lb [ENDNOTES]

[1] Specifically, Complainant filed safety complaints against his former employer.

[2] Complainant did not include the June 11, 1999 submission until his May 23, 2000, Response to Show Cause Order

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9521

SYED M.A. HASAN,
Petitioner, v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

WOLF CREEK NUCLEAR OPERATING CORPORATION,
Intervenor.

ORDER

Filed July 16, 2002

Before SEYMOUR, McKAY, and MURPHY, Circuit Judges.

Petitioner's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Deputy Clerk

No. 02-592

Supreme Court, U.S.
FILED
NOV 14 2002
CLERK

In The
Supreme Court of the United States

SYED M.A. HASAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR
and
WOLF CREEK NUCLEAR OPERATING CORPORATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WOLF CREEK NUCLEAR OPERATING CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a complainant in an administrative proceeding, after discovery and an opportunity to submit evidence, fails to allege an essential element of a claim, is the Department of Labor precluded by the Supreme Court's decision in Swierkiewicz v. Sorema, 534 U.S. 506 (2002), from dismissing the matter without a hearing?

(2) Does the Energy Reorganization Act's authorization for dismissal by the Secretary of Labor of whistleblower complaints without investigation preclude the Secretary from dismissing such complaints after the completion of the investigative stage, where the complaint fails to allege a required element?

LIST OF THE PARTIES

Pursuant to Sup. Ct. R. 14(1)(b), Wolf Creek Nuclear Operating Corporation ("WCNOC"), concurs with the description of the petitioner and the respondent Department of Labor contained in the Petition. However, the petitioner erroneously states that WCNOC "is not a party to this proceeding."

To the contrary, WCNOC was the respondent in the proceedings before the Department of Labor and was granted leave to intervene in the proceedings before the United States Court of Appeals for the Tenth Circuit. As such, WCNOC was a party to the proceeding in the Tenth Circuit, and is also a party to this proceeding pursuant to Sup. Ct. R. 12.6.

CORPORATE DISCLOSURE STATEMENT

Wolf Creek Nuclear Operating Corporation ("WCNOC"), a Delaware corporation, is owned by three parent companies: Kansas Gas and Electric Company; Kansas City Power & Light Company; and Kansas Electric Power Cooperative, Inc. None of WCNOC's parent companies are publicly held.

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STATEMENT OF THE CASE

In November of 1999, Petitioner Syed M.A. Hasan ("Hasan") submitted his resume to Wolf Creek Nuclear Operating Corporation ("WCNOC"), along with a cover letter stating that he was applying for a civil/structural engineering position. See Complaint at 1. Hasan did not reference in the resume or accompanying cover letter any specific job opening at WCNOC for which he was qualified, nor did he indicate that he was submitting his resume in response to any solicitation or advertisement on the part of WCNOC. See Addendum to Complaint at Pages E through G.

On November 18, 1999, two weeks after submitting his application to WCNOC, Hasan filed a Complaint with the United States Department of Labor alleging that WCNOC failed to hire him as a structural engineer in violation of the employee protection provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992). Hasan contended that WCNOC's failure to hire him was in retaliation for protected whistleblowing activities engaged in while working for a former employer at another site. The Occupational Safety and Health Administration ("OSHA"), pursuant to statute, investigated and found that Hasan's Complaint could not be substantiated. OSHA's investigative report stated that, in the fall of 1999, WCNOC was not seeking applicants with Hasan's civil/structural engineering experience and that there was "no evidence that [his]

application for employment was denied because of previous ERA activities." (CL 1).[1]

Hasan requested a hearing pursuant to 29 C.F.R. § 24.4, and the case was referred to the Office of Administrative Law Judges on February 28, 2000. On March 14, 2000, WCNOC filed a motion to dismiss Hasan's Complaint on the ground that it did not allege facts sufficient to state a claim of refusal to hire under 42 U.S.C. § 5851. (CL 5). WCNOC also filed a motion for protective order seeking to preclude discovery until the Administrative Law Judge ("ALJ") ruled on the pending motion to dismiss. (CL 5). On April 3, 2000, the ALJ denied WCNOC's motion for protective order and required WCNOC to respond to Hasan's discovery requests. (CL 10). On April 20, 2000, pursuant to 29 C.F.R. § 24.6, the ALJ issued a Show Cause Order stating that the court had "not received any information from Complainant to substantiate [Hasan's] claim" and directing Hasan to "submit evidence or offer arguments" in support of his claim within thirty days after the receipt of WCNOC's discovery responses. (CL 11).

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[1] "CL" represents the Certified List of documents comprising the record in the administrative proceeding before the United States Department of Labor ("DOL"), which was prepared by the DOL and filed with the Tenth Circuit on July 3, 2001. The subsequent number refers to the number identifying the document on the Certified List. Because Hasan's November 18, 1999 Complaint, the exhibits in support of his Complaint, and the March 15, 2000 addendum to his Complaint were not identified on the Certified List, WCNOC filed a supplemental appendix with the Tenth Circuit containing those documents.

In compliance with the ALJ's Order, on April 25, 2000, WCNOC provided Hasan with comprehensive responses to his discovery requests. WCNOC's discovery responses included the resumes of all civil/structural engineers, including contractors, working for WCNOC during the relevant time period. The resumes produced to Hasan contained complete information regarding those employees' qualifications and professional experience. WCNOC also produced to Hasan the affidavits of three WCNOC employees, submitted to OSHA during the investigative process, which affirmed that, in November of 1999, WCNOC had no openings for a civil/structural engineer. Hasan did not challenge the sufficiency of WCNOC's discovery responses by filing a motion to compel with the ALJ.

On May 22, 2000, Hasan filed a response to the ALJ's Show Cause Order in support of the allegations in his Complaint. (CL 12). After WCNOC submitted its opposition to Hasan's response, Hasan filed another brief attempting to explain and bolster his allegations. (CL 14). The ALJ considered these post-discovery supplemental submissions, but nevertheless found that Hasan's complaint "failed to set forth a prima facie case of proscribed behavior or provide a full statement of the acts and omissions, with pertinent dates, which are believed to constitute a violation" in accordance with 29 C.F.R. § 24.5(a)(2). (Pet. App. A24). Consequently, the ALJ issued a recommended decision dismissing Hasan's Complaint.

Hasan sought review before the Department's Administrative Review Board ("ARB").[2] (CL 16). In its Final Decision and Order, the ARB concluded that Hasan failed to state a discriminatory failure to hire claim under 42 U.S.C. § 5851(b). (Pet. App. A15). In particular, the ARB found that Hasan's Complaint did not allege any adverse action on the part of WCNOC because it lacked any allegation that, following Hasan's rejection, WCNOC continued to seek applicants with similar professional qualifications to fill the purportedly open position. Because this allegation was lacking, Hasan's claim could not meet the elements required by the Secretary to proceed past the gate keeping provision, § 5851(b)(3).[3] As Hasan's Complaint did not satisfy the Secretary's longstanding test for stating a claim of refusal to hire, the ARB affirmed the ALJ's decision dismissing Hasan's Complaint. (Pet. App. A15).

On June 5, 2001, Hasan filed a petition seeking review of the ARB's decision by the United States Court of Appeals for the Tenth Circuit. Employing the framework set forth in the gate keeping provision, 42

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[2] The Administrative Review Board has been delegated the authority to act for the Secretary of Labor and issue final decisions on her behalf. 29 C.F.R. § 24.8(a).

[3] The Secretary's brief filed with the Tenth Circuit in this action confirms the Department's view that this statutory provision, combined with the implementing regulations set forth in 29 C.F.R. § 24.5, was correctly applied by the ALJ and ARB in this case to determine whether a complaint filed under the ERA fails to state a *prima facie* case and therefore warrants dismissal. See Brief for Secretary at 17 - 19.

U.S.C. § 5851(b)(3) - the same framework upon which the ARB based its decision - the Tenth Circuit affirmed the ARB's dismissal of Hasan's claim. Like the ARB, the Tenth Circuit determined that Hasan could not proceed past the gate keeping barrier of § 5851(b)(3) because he failed to allege the required element that WCNOC took some adverse action against him because of his prior whistleblowing activities. (Pet. App. A6).

Specifically, the Tenth Circuit ruled that Hasan's Complaint did not allege an adverse action of discriminatory refusal to hire for two reasons: (1) Hasan failed to allege that there was an open position at WCNOC for which he was qualified; and (2) Hasan failed to allege that WCNOC either filled that position or continued to search for applicants for that position after refusing to hire him. (Pet. App. A6). Further, the Tenth Circuit found that none of the additional discovery Hasan sought to conduct would have enabled him to allege these required elements. (Pet. App. A7). Accordingly, the Tenth Circuit ruled that the Secretary's actions were supported by substantial evidence and were not arbitrary or capricious. The Tenth Circuit therefore denied Hasan's petition for review of the Secretary's decision. (Pet. App. A7).[4]

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[4] The Tenth Circuit's decision was originally issued as an "Order and Judgment" pursuant to Tenth Circuit Rule 36.1. Rule 36.1 states that a case disposed of under this rule "does not require application of new points of law that would make the decision a valuable precedent." A motion to publish was granted by the court on July 26, 2002.

On June 5, 2002, Hasan filed a petition for rehearing or rehearing *en banc*. Hasan alleged that the Tenth Circuit committed reversible error by not considering this Court's holding in Swierkiewicz v. Sorema, 534 U.S. 506 (2002), which he argued precluded dismissal of his administrative complaint.[5] Hasan's petition for rehearing was denied without comment on July 16, 2002. (Pet. App. A25).[6]

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[5] The Tenth Circuit issued its Order and Judgment on April 26, 2002, after this Court's decision in Swierkiewicz. Not surprisingly, the Tenth Circuit did not address or refer to Swierkiewicz in its opinion, because, as discussed below, Swierkiewicz does not apply to administrative proceedings.

[6] A motion to publish the Tenth Circuit's decision was filed by a non-party and opposed by Hasan on the ground that the decision "rests on a very narrow holding." (Pet. Opp. to Non-Party Mot. for Publication at 4). Hasan also argued that, with respect to Swierkiewicz's application to administrative proceedings, the law in the circuit courts is "in flux" and "unsettled," referring to the pendency of petitions for rehearing filed on Hasan's behalf in "very similar proceedings" in the Seventh and Eleventh Circuits. Id. at 5, 7 - 8. Both petitions have since been denied. Hasan v. Dep't of Labor, 31 Fed. Appx. 328 (7th Cir.), reh'g denied, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002) (affirming ARB's dismissal); Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002 (same). No petitions for *certiorari* were filed.

REASONS FOR DENYING THE PETITION

I. The Application Of The Gate Keeping Provision Of 42 U.S.C. § 5851(b)(3) To The Proceeding Before The Administrative Law Judge Is Supported By The Statute, Comports With Longstanding Practice And Does Not Warrant Review By This Court.

A. The Gate Keeping Provision In § 5851(b)(3) Applies Beyond The Investigative Stage.

In 1992, Congress amended the ERA to include § 5851(b)(3), the "gate keeping" function which requires that complainants plead a *prima facie* case. Pub. L. No. 102-486, 106 Stat. 2776 (1992). This section contains provisions relating to both the investigative stage and the disposition of the complaint. 42 U.S.C. § 5851(b)(3). The Secretary has implemented regulations defining a *prima facie* showing under the ERA. 29 C.F.R. § 24.5(b) (2001).

Hasan claims that the gate keeping function of § 5851(b)(3) has only a single application and can only be used at the investigative stage. (Pet. 15). The 1992 amendments to the ERA were well described in Doyle v. Sec'y of Labor, 285 F.3d 243, 249 n.9 (3rd Cir. 2002): "[t]he amendment, aptly titled 'Avoidance of Frivolous Complaints,' also adopted a host of additional gate keeping functions (for example, the Secretary cannot even initiate an investigation until the complainant has established a prima facie case)." As explained in Doyle, § 5851(b)(3) does not apply simply to the one "example" of the Secretary's investigation, but also to

later stages of the proceeding, including the Secretary's "determination that a violation . . . has occurred." Id.; see also 42 U.S.C. § 5851(b)(3)(C).

The proceeding before the ALJ is a *de novo* "proceeding on the merits." 29 C.F.R. § 24.7(b). The OSHA decision becomes "inoperative" once a request for a hearing is filed. 29 C.F.R. § 24.4(d)(2). Nevertheless, a claimant who filed a frivolous claim, dismissed without investigation by OSHA under § 5851(b)(3)(A), could easily evade the Congressional purpose of the amendments by requesting a hearing, which, under Hasan's view, would be mandatory no matter how lacking in merit. This result would be completely contrary to the Congressional purpose and the Secretary's goal to enforce the statute to provide prompt relief for deserving claims.[7] See 29 C.F.R. § 24.7(a) & (c)(1) (requiring ALJ to issue decision in 20 days and providing interim relief).

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[7] This petitioner's litigation history aptly demonstrates one important reason for the gate keeping requirements – the speedy resolution of repetitive meritless claims. Hasan's extensive claim history is cited in the ARB's opinion in this case. (Pet. App. A15 n.2). Basically identical claims by this petitioner of other failures to hire have been dismissed by the ARB and those dismissals upheld by the Seventh and Eleventh Circuits. See Hasan v. Dep't of Labor, 31 Fed. Appx. 328 (7th Cir.), reh'g denied, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002) (affirming ARB's dismissal); Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002 (same).

B. The Department Of Labor Routinely Applies The Gate Keeping Function To Proceedings Before An Administrative Law Judge.

The requirement that the complainant plead a *prima facie* case is and has been routinely used throughout the administrative process both before and after the enactment of the 1992 amendments. See Hasan v. Dep't of Labor, 31 Fed. Appx. at 330 (affirming ARB's decision to dismiss claim based on failure to state a *prima facie* case); Hasan v. Dep't of Labor, 35 Fed. Appx. at 855 (affirming ARB's decision to dismiss claim based on failure to state a *prima facie* case); Saporito v. Fla. Power & Light Co., 94-ERA-35 at 6 (ARB July 19, 1996) aff'd, 192 F.3d 130 (11th Cir. 1999), reh'g denied, 210 F.3d 395 (11th Cir. 2000) (upholding ALJ's decision to dismiss claim because complainant failed to allege all elements of ERA claim); Varnadore v. Oak Ridge Nat'l Lab., 95-ERA-1 at 12 (ALJ Sept. 20, 1995) aff'd, 141 F.3d 625 (6th Cir), reh'g denied, 1998 U.S. App. LEXIS 13688 (6th Cir. 1998) (dismissing whistleblower claim based on failure to set forth or support with sufficient facts essential elements of the claim); Doyle v. Bartlett Nuclear Servs., 89-ERA-18 at 3 (Sec'y May 22, 1990) (dismissing complaint for failing to allege discriminatory conduct). The ARB has clearly stated that "[I]f a complaint fails to allege a *prima facie* case, the matter is subject to immediate dismissal." Hasan v. Commonwealth Edison Co., Nos. 01-222, 01-0033, 01-005 (ARB Apr. 23, 2001) (citing Lovermi v. Bell South Mobility, Inc., 962 F. Supp. 136 (S.D. Fla. 1997)).

In addition, two other circuit courts have reviewed decisions where the ALJ dismissed two other complaints by Hasan for failure to state a *prima facie* case and neither questioned the ability of an ALJ to grant a motion to dismiss based on failure to state a claim under § 5851(b)(3). See Hasan v. Dep't of Labor, 31 Fed. Appx. at 331 (affirming ARB's decision to dismiss claims based on failure to state a *prima facie* case); Hasan v. Dep't of Labor, 35 Fed. Appx. at 855 (affirming ARB's dismissal). Accordingly, the Tenth Circuit's decision is merely a routine application of a widely-used standard that does not present a novel or important question of law that warrants the attention of this Court.

Hasan cites Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568 (11th Cir. 1997), for the proposition that § 5851(b)(3) only applies to the investigative stage. Neither the holding nor the reasoning of Stone & Webster, however, supports this argument. Stone & Webster concerns an ERA complainant who had a hearing on the merits before an ALJ. Id. at 1571. While Stone & Webster mentions that the gate keeping function must be overcome at the investigative stage, Id. at 1572, it does not discuss the application of this concept at the ALJ stage because no motion to dismiss was filed. See id. at 1571.

Hasan also cites the preamble to the implementing regulations, 63 Fed. Reg. 6614, 6615 (Feb. 9, 1998), as support for his assertion that the gate keeping function only applies at the investigative stage. However, the statement that the 1992 amendments are "a limitation on the investigative authority of the

Secretary of Labor" clearly refer to § 5851(b)(3)(A)&(B) which apply the gate keeping function to the investigative stage. This statement, however, does not preclude dismissal under § 5851(b)(3)(C)&(D). Hasan cites no other authority for his argument that § 5851(b)(3) applies exclusively to the investigative stage.

This case does not present a conflict in the circuit courts that requires resolution. Hasan cites Stone & Webster for the proposition that there is a circuit split. Hasan claims that there is a split in the circuits because the Tenth Circuit applied § 5851(b)(3) to an ALJ proceeding while the Eleventh Circuit discussed its application to the investigative stage in Stone & Webster. (Pet. 15 n.3). However, this does not create a conflict. Neither court held that § 5851(b)(3) applies exclusively to one stage of the proceeding or specifically stated that § 5851(b)(3) could not apply to another stage. Hasan cites no other case law in support of his claim that there is a circuit split requiring resolution by this Court.

It should be noted that Hasan raised the alleged misapplication of the gate keeping provision for the first time in his petition for rehearing to the Tenth Circuit. The Tenth Circuit did not grant the petition that included this argument. (Pet. App. A25). Neither the ALJ nor the ARB was asked to address the argument now before this Court. Notably, however, neither the ARB nor the Tenth Circuit raised any doubt about the ability of the ALJ to dismiss the Complaint based on failure to state a *prima facie* case in accordance with § 5851. (Pet. App. A5, A15).

C. The Tenth Circuit Decision Raises a Fact Specific Question.

Hasan claims that the Tenth Circuit's decision raises an important question of federal law because the decision "completely vitiates" the Congressional purpose of the ERA.[8] (Pet. 16). However, Congress' purpose in enacting the 1992 amendments to the ERA was to avoid and dispose of frivolous claims at an early stage. See Doyle v. Sec'y of Labor, 285 F.3d 243, 249 n.9 (3rd Cir. 2002). The Tenth Circuit decision simply carries out the purpose of the 1992 amendments by requiring Hasan to meet the statutory pleading standard for stating a claim under the ERA. As the Tenth Circuit correctly applied this Congressional mandate, the case turns on whether or not Hasan adequately pled his case. Thus, this case involves a fact specific inquiry - not an important question of federal law that requires review by this Court. See Sup. Ct. R. 10.

II. The Tenth Circuit's Ruling Does Not Implicate This Court's Decision in Swierkiewicz.

Hasan asserts that this Court should grant the writ because the Tenth Circuit's decision "conflicts with the pleading principles set forth by this Court . . . in Swierkiewicz v. Sorema, 534 U.S. 506, 122 S.Ct. 992 (2002)." (Pet. 11). Hasan's reliance on Swierkiewicz is

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[8] Interestingly, Hasan did not think the decision important enough to be published, as he opposed a motion to publish the Tenth Circuit's Order and Judgment. See Petitioner's Opposition to Non-Party Motion for Publication of Order and Judgment at 1.

misplaced. In Swierkiewicz this Court held that, under Title VII of the Civil Rights Act, a plaintiff does not have to plead specific facts in order to survive a Rule 12(b)(6) motion to dismiss because the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Swierkiewicz, 534 U.S. at 508 (quoting Fed. R. Civ. P. 8(a)(2)). The Swierkiewicz decision did not address and has no bearing on the appropriate pleading standard in an administrative action under the ERA.[9]

The instant action was brought to obtain relief under an administrative procedure implemented by the Department of Labor. The Federal Rules of Civil Procedure do not govern the pleading standard for a complaint under the ERA. Rather, 42 U.S.C. § 5851(b)(3) and 29 C.F.R. Part 24 address the appropriate pleading standard for complaints filed with the Department of Labor under the ERA. The Department's regulations governing these proceedings specifically state that the Federal Rules apply only in situations "not provided for or controlled by" the

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[9] Hasan argues that Swierkiewicz applies to actions under the ERA because the Department of Labor has adopted the Title VII framework. (Pet. 13 n.2). However, the use of Title VII concepts for defining the elements of a claim does not change an administrative proceeding into a civil action governed by the Federal Rules of Civil Procedure. Under Chevron, the Secretary should be given deference in her reasonable choice of a framework for adjudicating cases in an area where she has been delegated authority. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

regulations. 29 C.F.R. § 18.1(a). The regulations provide the standards for complaints in ERA proceedings. Under 29 C.F.R. § 24.3(c), the complainant should include a "full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation."

Moreover, in Swierkiewicz, this Court mentioned that the notice pleading standard in Fed. R. Civ. P. 8 is "linked" to other provisions such as the motion for a more definite statement under Fed. R. Civ. P. 12(e). Swierkiewicz, 534 U.S. at 513-14. There is no analogous provision under the ERA or the applicable regulations to allow an employer to request a more definite statement. There is no provision for filing an answer in an ERA claim as there is in the Federal Rules. Fed. R. Civ. P. 7; 63 Fed. Reg. 6613, 6617 (Feb. 9, 1998). Proceedings under the ERA are more informal. Formal rules of evidence do not apply. 29 C.F.R. § 24.6(e)(1). These provisions have been put in place to expedite and simplify the administrative process where many complainants appear *pro se*. 63 Fed. Reg. 6613, 6619 (Feb. 9, 1998). Speed is important because the statute requires that the entire proceeding, from the filing of the complaint to a decision by the Secretary, take only 90 days. 42 U.S.C. § 5851(b)(2)(A). Accordingly, the notice pleading system used in the federal courts is not applicable to complaints filed pursuant to the ERA.

The holding in Swierkiewicz simply does not apply to an administrative proceeding such as this one. [10]

Hasan has cited no decisions suggesting the extension of Swierkiewicz to administrative proceedings. After Swierkiewicz was decided, Hasan presented the same arguments set forth in his petition to this Court to the Tenth, Seventh and Eleventh Circuits in Petitions for Rehearing. All have been denied. [11] Hasan v. Dep't of Labor, 2002 U.S. App. LEXIS 14654 (7th Cir. 2002). Hasan v. Dep't of Labor, 35 Fed. Appx. 855 (11th Cir. 2002), reh'g denied, July 18, 2002.; (Pet. App. A25); see also Baxter v. Rose, 305 F.3d 486, 490 (6th Cir. 2002) (stating that Swierkiewicz did not displace statutory pleading standard in Prison Litigation Reform Act).

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[10] Furthermore, even if the holding in Swierkiewicz changed the requirements for a *prima facie* case in an administrative action, the ALJ's decision dismissing the complaint would still be upheld. The ALJ based the dismissal on two grounds: (1) Hasan failed to set forth a *prima facie* case; and (2) Hasan "failed to . . . provide a full statement of the act and omissions with pertinent dates, which are believed to constitute a violation." (Pet. App. A24). As Hasan did not include a full statement as required by the regulations, his complaint was rightly dismissed in any event. Review by this Court of Hasan's questions presented would not change the ALJ's ruling on this second ground for dismissal.

[11] Hasan did not seek review by this Court of the decisions in the Seventh and Eleventh Circuits.

III. Because The Complainant Was Afforded Discovery In This Case, The Second Question Presented By The Petitioner Is Not Supported By The Record.

Hasan's petition mistakenly states that he was "afforded no discovery" prior to the dismissal of his Complaint. (Pet. 9). In fact, WCNOC moved for a protective order to stay discovery until the motion to dismiss was decided. (CL 5). In an Order dated April 3, 2000, the ALJ denied the motion for a protective order and directed WCNOC to respond to Hasan's discovery requests. (CL 10). The ALJ also deferred the date for Hasan's response to the ALJ's Order to Show Cause until "thirty (30) days after discovery is due or May 26, 2000" (CL 11).

WCNOC responded on April 25, 2000. WCNOC's discovery responses included: (1) information and documentation regarding recruiting and selection of WCNOC employees; (2) information regarding termination of employees for failing to comply with environmental protection or nuclear safety laws or regulations; (3) communications between WCNOC and Hasan; (4) all non-privileged documentation referring to Hasan; (5) documentation regarding contractual arrangements for hiring civil/structural/pipe support engineers during the relevant time period, with trade secret information redacted; and (6) information and documentation regarding the qualifications of civil/structural/pipe support engineers or contractors working for WCNOC during the relevant time period. In his two responses to the Show Cause Order, (CL 12 & 14), Hasan

complained about not receiving full discovery because WCNOC deleted names and personal data from resumes provided. Hasan never filed a Motion to Compel further answers, and as the Tenth Circuit noted (Pet. App. A6-7), the information withheld would not have helped meet the deficiencies in Hasan's case.[12]

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[12] Hasan's brief to the ARB complained that he had not been provided "ALL THE DISCOVERY DOCUMENTS (WITHOUT REDACTIONS)." (p. 8). His brief in the Tenth Circuit challenged the failure to provide him "complete and unredacted Discovery documents . . ." (p. 9). The ARB opinion specifically acknowledges that WCNOC had "participat[ed] in discovery." (Pet. App. A11). The Department of Labor's brief to the Tenth Circuit also emphasized that "[i]t is of critical importance that before Hasan was determined not to have set forth a prima facie case, he was permitted by the ALJ to conduct discovery." See Brief for the Secretary of Labor at 20. The Tenth Circuit's statement (Pet. App. A7) that the ARB affirmed dismissal "prior to discovery" is inaccurate.

CONCLUSION

For the reasons set forth above, Hasan's petition for writ of *certiorari* should be denied.

Dated: November 14, 2002

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-592

In the Supreme Court of the United States

SYED M. A. HASAN, PETITIONER

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

The Energy Reorganization Act of 1974 prohibits discrimination against employees who engage in certain protected activities but requires the Secretary of Labor to dismiss a complaint, and not investigate it, "unless the complainant has made a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(A). When the Secretary dismisses a complaint, an employee may file a complaint and request a hearing before an administrative law judge (ALJ). 42 U.S.C. 5851(b)(2)(A). The question presented is whether a complaint filed with an ALJ was properly dismissed when, after discovery, petitioner failed to allege a prima facie case of unlawful discrimination.

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In the Supreme Court of the United States

No. 02-592

SYED M. A. HASAN, PETITIONER

v.

DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A8) is reported at 298 F.3d 914. The decision and order of the Department of Labor's Administrative Review Board (Pet. App. A9-A17) is unreported. The recommended decision and order of the administrative law judge (Pet. App. A18-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2002. A petition for rehearing was denied on July 16, 2002 (Pet. App. A25). The petition for a writ of certiorari was filed on October 11, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Energy Reorganization Act of 1974 (ERA), as amended, prohibits employers from discriminating against employees who have engaged in certain activities relating to nuclear safety. 42 U.S.C. 5851(a). An employee who believes that he has been subjected to discrimination in violation of the Act may file a complaint with the Secretary of Labor. 42 U.S.C. 5851(b)(1); 29 C.F.R. 24.3(a) and (c), 24.5(b)(2).

Within 30 days of the filing of the complaint, the Secretary must investigate the complaint and determine whether unlawful discrimination occurred. 42 U.S.C. 5851(b)(2)(A); 29 C.F.R. 24.4, 24.5. The Secretary shall dismiss a complaint and not investigate it "unless the complainant has made a prima facie showing that [protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 42 U.S.C. 5851(b)(3)(A). The Secretary also shall not investigate "if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior." 42 U.S.C. 5851(b)(3)(B). The Secretary has delegated responsibility for investigating and determining whether unlawful discrimination occurred to the Assistant Secretary for Occupational Safety and Health (OSHA). 67 Fed. Reg. 65,008 (2002) (current delegation); 62 Fed. Reg. 111 (1997) (earlier delegation).

A complainant who is dissatisfied with the Assistant Secretary's determination dismissing a complaint at the investigation stage may request a hearing before an Administrative Law Judge (ALJ). 42 U.S.C. 5851(b)(2)(A); 29 C.F.R. 24.5(d), 24.6. Proceedings before an ALJ are governed by regulations generally applicable to all ALJ proceedings within the Depart-

ment, 29 C.F.R. Pt. 18, as well as regulations specifically promulgated for "handling of discrimination complaints under federal employee protection statutes." 29 C.F.R. Pt. 24. The regulations, among other things, permit the filing of motions and discovery. 29 C.F.R. 18.1(a), 18.6, 18.13-18.22.

The hearing before the ALJ "shall be a proceeding on the merits of the complaint." 29 C.F.R. 24.7(b). An ALJ does not review the Secretary's determination to dismiss or not to dismiss a complaint. *Ibid.* In an ALJ proceeding, "a determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint," and "[r]elief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." *Ibid.*

The ALJ's recommended decision and order becomes a final order of the Secretary unless a petition for review is timely filed with the Department of Labor's Administrative Review Board (ARB). 29 C.F.R. 24.7(a) and (d), 24.8(a). The ARB issues the final agency decision on behalf of the Secretary, 29 C.F.R. 24.8(a), and that decision is reviewable in the court of appeals. 42 U.S.C. 5851(c)(1).

2. Petitioner applied for an engineering job at respondent Wolf Creek Nuclear Operating Corporation (Wolf Creek). Pet. App. A10, A19. In his application, petitioner stated that he had a history of whistleblowing activity. *Id.* at A10. When petitioner had not heard from Wolf Creek within two weeks, he filed an ERA complaint with the Secretary, alleging that Wolf

Creek had refused to hire him because he was a whistleblower. *Id.* at A3-A4, A10, A19.

OSHA investigated petitioner's complaint and found that it lacked merit. Pet. App. A4, A19. Petitioner then requested an ALJ hearing and, at the same time, mailed to Wolf Creek a request for production of documents and interrogatories. *Ibid.*; App., *infra*, 2a. Wolf Creek filed a motion to dismiss the complaint and a motion for a protective order. Pet. App. A19; App., *infra*, 2a. The ALJ denied Wolf Creek's motion for a protective order and directed Wolf Creek "to comply with, respond to, or object to each request for production and interrogatory filed by [petitioner]." *Ibid.* The ALJ subsequently issued a show cause order directing petitioner to "submit evidence or offer arguments to the Court" within 30 days after discovery is due or by May 26, 2000. *Id.* at 4a. The order stated that if petitioner "does not respond, his complaint will be dismissed." *Ibid.*; see Pet. App. A11. Wolf Creek provided documents that were responsive to petitioner's discovery requests, but redacted certain information from those documents. *Ibid.*; Wolf Creek Br. in Opp. 16. In his response to the show cause order, petitioner did not allege that the position for which he applied remained open or that Wolf Creek continued to seek applicants for that position. Pet. App. A11-A12.

The ALJ issued a recommended decision and order to dismiss petitioner's complaint. Pet. App. A18-A24. The ALJ found that petitioner "failed to submit evidence * * * which alleged any set of facts upon which relief could be granted." *Id.* at A19. In reaching that conclusion, the ALJ concluded that dismissal is proper if the complainant fails to allege a prima facie case of unlawful discrimination. *Id.* at A20. In order to allege a prima facie case, the ALJ concluded, a complainant must

allege that (1) he engaged in protected activity; (2) respondent was aware of the protected activity; (3) the complainant was subjected to adverse action; and (4) the evidence raises a reasonable inference that protected activity was the likely reason for the adverse action. *Id.* at A20-A21.

Applying those factors, the ALJ found that petitioner had not alleged that the persons at Wolf Creek responsible for hiring were aware of his prior protected activity or that he was subjected to an adverse action. Pet. App. A22-A23. With respect to the latter factor, the ALJ noted that petitioner failed to allege that the position for which he applied remained open or that Wolf Creek sought other applicants for the position. *Id.* at A22. Based on those deficiencies, the ALJ recommended dismissal of the complaint for failure to "set forth a prima facie case of proscribed behavior, * * * provide a full statement of the acts and omissions * * * which are believed to constitute a violation," and "state a claim upon which relief can be granted." *Id.* at A24.

3. The ARB dismissed petitioner's complaint. Pet. App. A9-A17. The ARB agreed with the ALJ that petitioner was required to allege a prima facie case based on the four factors set forth in the ALJ's recommended decision, and that petitioner had failed to allege two of those factors. *Id.* at A13. In particular, like the ALJ, the ARB concluded that petitioner had failed to allege either that Wolf Creek was aware of his protected activity or that he was subjected to an adverse action. *Id.* at A13-A15.

4. The court of appeals affirmed the ARB's decision. Pet. App. A2-A8. The court noted that the ERA includes a "gatekeeping function," 42 U.S.C. 5851(b)(3)(A), that prohibits the Secretary from investigating a complaint where the complainant fails to

establish a prima facie case that his protected behavior was a contributing factor in an unfavorable personnel action. Pet. App. A4. The court concluded that the ARB had properly examined the four elements discussed above to determine whether petitioner "could proceed beyond the § 5851(b)(3) barrier." *Id.* at A5. Disagreeing with the ARB, the court found that petitioner had adequately alleged that Wolf Creek was aware of petitioner's protected activity. *Ibid.* The court agreed with the ARB, however, that petitioner failed to satisfy the adverse action component of the prima facie case. The court explained that petitioner "failed to allege that a position for which he was qualified was available and that [Wolf Creek] either filled that position or continued to search for applicants for that position after refusing to hire him." *Id.* at A6. The court found petitioner's "conclusory statement that a company the size of [Wolf Creek's] always has positions open" to be insufficient to establish that element of a prima facie case. *Ibid.*

The court of appeals also rejected petitioner's argument that he was improperly denied discovery. Pet. App. A6-A7. The court reasoned that none of the discovery petitioner requested would have established that Wolf Creek hired someone with petitioner's qualifications to fill an open position or that Wolf Creek continued to seek someone with petitioner's qualifications. *Ibid.*

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioner's complaint. Pet. App. A2-A8. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 11) that the dismissal of his complaint for failure to allege a prima facie case conflicts with this Court's decision in *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506 (2002). That contention is without merit and does not warrant review.

In *Swierkiewicz*, the Court held that a complaint in an employment discrimination lawsuit under Title VII need not allege specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 534 U.S. at 508. The Court reasoned that *McDonnell Douglas* set forth an evidentiary standard, not a pleading requirement, and that transforming it into a pleading requirement would conflict with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." 534 U.S. at 512-513.

The question presented in this case does not concern what facts must be alleged in a complaint filed *in a court in a Title VII case.* Instead, it concerns what facts must be alleged in a complaint filed with *an administrative agency under the ERA.* By its terms, *Swierkeiweicz* does not control the resolution of that question.

Moreover, there is an important distinction between Title VII and the ERA. Under the ERA, a complainant must establish a prima facie case that protected behavior contributed to an unfavorable personnel action before the Secretary may even investigate a complaint. 42 U.S.C. 5851(b)(3)(A). The court of appeals concluded that this requirement, unique to the ERA, serves a "gatekeeping function," Pet. App. A4, and therefore operates as a pleading requirement as well as an evidentiary standard. Because *Swierkiewicz* involved

an interpretation of Title VII and Federal Rule of Civil Procedure 8(a), while the court of appeals' decision in this case involved an interpretation of the ERA and its unique gatekeeping provision, there is no conflict between the two.

2. Petitioner also errs in contending (Pet. 15) that the court of appeals' application of the ERA "gatekeeper" provision to the adjudicatory stage of the proceeding conflicts with the Eleventh Circuit's decision in *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (1997). In that case, the Eleventh Circuit addressed the standard for proving an ERA claim on the merits. *Id.* at 1572. It did not consider the allegations that an ERA complainant must make to avoid dismissal of a complaint. Petitioner also fails to mention that the Seventh and Eleventh Circuits recently affirmed the dismissals of several of his ERA complaints that are substantially the same as the complaint at issue here. See *Hasan* v. *Florida Power & Light Co.*, No. 01-004 (Dep't of Labor ARB May 17, 2001), aff'd, 35 Fed. Appx. 855 (11th Cir. 2002) (Table); *Hasan* v. *United States Dep't of Labor*, 31 Fed. Appx. 328 (7th Cir. 2002).

3. Petitioner contends (Pet. 14) that requiring allegations of a prima facie case at the pleading stage operates unfairly when a complainant needs discovery in order to establish the elements of a prima facie case. This case, however, does not present the question whether it would be consistent with the ERA or the Secretary's regulations to require an employee to allege a prima facie case prior to receiving any discovery. The ALJ recommended dismissal of the case only after the ALJ ordered respondent to provide petitioner with discovery and gave petitioner an opportunity to allege a

prima facie case in light of the discovery that was provided.

Indeed, the circumstances surrounding the ALJ's recommended dismissal provide a further reason to deny review in this case. In dismissing petitioner's case, the ALJ not only considered the allegations in petitioner's complaint. The ALJ also considered the evidence petitioner submitted in response to the ALJ's show cause order after petitioner had an opportunity for discovery. Pet. App. A24 (recommending dismissal "[a]fter a careful review of the record"). In that procedural posture, the dismissal of petitioner's complaint could be considered as a grant of summary judgment. See Fed. R. Civ. P. 12(b)(6) (if, on a motion "to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"). As the Department argued in the court of appeals, summary judgment was proper because petitioner failed "to make a showing sufficient to establish the existence of an element essential to [his] case." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986).

Petitioner asserts (Pet. 14) that he did not obtain all the discovery that he sought, and that additional discovery would have helped in establishing a prima facie case. But the court of appeals concluded that the additional discovery petitioner sought would not have assisted petitioner in proving a prima facie case, Pet. App. A6, and that fact-bound issue does not warrant this Court's review.

4. Finally, petitioner errs in contending (Pet. 16) that the court of appeals' decision will "have broad application" to other whistleblower provisions in environmental statutes. Unlike the ERA, other environmental

whistleblower provisions do not require the Secretary to dismiss complaints without investigation unless a complainant makes a prima facie showing of discrimination. See, *e.g.*, 15 U.S.C. 2622 (Toxic Substances Control Act); 33 U.S.C. 1367 (Federal Water Pollution Control Act); 42 U.S.C. 300j-9(i) (Safe Drinking Water Act); 42 U.S.C. 6971 (Solid Waste Disposal Act); 42 U.S.C. 7622 (Clean Air Act); 42 U.S.C. 9610 (Comprehensive Environmental Response, Compensation, and Liability Act of 1980). Nor will the court's decision "take[] away the safe haven the ERA was intended to create for nuclear whistleblowers." Pet. 16. Rather, the decision acts as a reasonable safeguard against the filing of insubstantial complaints.

The facts of this case illustrate the need for such a safeguard. Petitioner has a history of applying for jobs and then filing complaints and seeking broad discovery when he receives no response. See Pet. App. A10, A15 n.2. Particularly in that context, the court of appeals' decision does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor of Labor

ALLEN H. FELDMAN
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DECEMBER 2002

APPENDIX

[(Seal Omitted)]

U.S. Department of Labor
Office of Administrative Law Judges
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(412) 644-5005 (FAX)

CASE NO.: 2000-ERA-14

IN THE MATTER OF
SYED M. A. HASAN, COMPLAINANT

v.

WOLF CREEK NUCLEAR OPERATING CORP.,
RESPONDENT

[DATE: APR. 3, 2000]

ORDER

Complainant, Syed M.A. Hasan, filed a complaint with the Occupational Safety and Health Administration (OSHA) on November 18, 1999, alleging violations of Section 211 of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24. Specifically, Complainant alleged that he was not hired by Respondent, Wolf Creek Nuclear Operating Corp., because he had engaged in activities protected under the provisions of the ERA. On February

17, 2000, OSHA found the complaint to have no merit. On February 23, 2000, Complainant requested a hearing before an Administrative Law Judge and concurrently mailed a request for production of documents and interrogatories to the Respondent. On March 14, 2000, the Respondent filed a Motion to Dismiss and a Motion for Protective Order.

I decline to issue a protective order based on the general objections raised by counsel that Mr. Hasan's discovery should be stayed until the Respondent's Motion to Dismiss is resolved and that the discovery will cause unnecessary expense and burden. The Respondent is directed to comply with, respond to, or object to each request for production and interrogatory filed by Mr. Hasan by April 25, 2000.

So ORDERED this 3rd day of April, 2000, at Pittsburgh, Pennsylvania.

/s/ ROBERT J. LESNICK
ROBERT J. LESNICK
Administrative Law Judge

RJL/lab

[(Seal Omitted)]

U.S. Department of Labor

Office of Administrative Law Judges
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(412) 644-5754
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CASE NO.: 2000-ERA-14

IN THE MATTER OF
SYED M. A. HASAN, COMPLAINANT

v.

WOLF CREEK NUCLEAR OPERATING CORP.,
RESPONDENT

[DATE: APR. 20, 2000]

ORDER TO SHOW CAUSE

The above-captioned case has not yet been scheduled for hearing. Respondent's counsel submitted a Motion To Dismiss on March 15, 2000. Respondent alleges that Complainant has failed to state a claim upon which relief can be granted.

At the present time, this Court has not received any information from Complainant to substantiate his claim. Respondent was ordered by this Court to comply with, respond to, or object to each discovery request by April 25, 2000. Accordingly,

ORDER

IT IS ORDERED that within thirty (30) days after discovery is due or by May 26, 2000, Complainant must show cause why his complaint should not be dismissed. Complainant can submit evidence or offer arguments to the Court. If Complainant does not respond, his complaint will be dismissed.

/s/ ROBERT J. LESNICK
ROBERT J. LESNICK
Administrative Law Judge

RJL/mas/lb

Supreme Court, U.S.
FILED
JAN 13 2003
OFFICE OF THE CLERK

(4)

No. 02-592

IN THE SUPREME COURT OF THE UNITED STATES

SYED M. A. HASAN,
Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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6 pp

PETITIONER'S REPLY

The Department of Labor ("DOL") and Wolf Creek Nuclear Operating Corp. ("Wolf Creek) have submitted briefs in opposition to Mr. Hasan's Petition for *Certiorari.*[*] In their papers, the respondents re-frame the questions presented and argue that Mr. Hasan was afforded discovery during the DOL proceeding below. Because the respondents' representations are incorrect and misleading, Mr. Hasan respectfully submits the following reply pursuant to Sup. Ct. R. 15.6.

I. MR. HASAN WAS NEVER AFFORDED PERTINENT DISCOVERY IN THE DOL ADMINISTRATIVE PROCEEDING BELOW.

One question presented in this case is whether, absent discovery, the Department of Labor may dismiss a claim brought under the Energy Reorganization Act ("ERA") for failure to allege a *prima facie* case of employment discrimination. *See* Petition for *Certiorari*, p. i.

While the respondents would have this Court believe the question presented is moot and that Mr. Hasan actually *was* afforded discovery, the reality is that Mr. Hasan *was never afforded* pertinent discovery below, and that failure has been an issue in this case all along.

---

[*] Mr. Hasan objects to Wolf Creek's self-designation as "Respondent," since DOL is the sole proper respondent in this matter. Nevertheless, for the sake of brevity, Mr. Hasan refers to DOL and Wolf Creek as "the respondents" in this Reply.

First, this Court needs look no further than the plain language of the Tenth Circuit's decision. Therein, the court expressly noted that Hasan was not afforded discovery: "the ARB's decision to dismiss this action *prior to discovery* did not affect Mr. Hasan's ability to state a viable claim." *See* Appendix to Petition for *Certiorari* ("App."), p. A7.

Clearly, the Tenth Circuit heard and rejected the respondents' arguments, as it expressly found that even though Hasan did not receive discovery, his claim could be dismissed for failure to state a *prima facie* case of employment discrimination.[1]

The administrative record fully supports the Tenth Circuit's findings on this point, and the respondents arguments to the contrary are at best misleading and, at worst, patently false. For example, while Wolf Creek tells this Court that it provided Hasan with "comprehensive responses to his discovery requests," and that "Hasan did not challenge the sufficiency of (Wolf Creek's) discovery responses by filing a motion to compel with the ALJ," Brief of Wolf Creek, p. 3, the record shows this statement to be untrue.

Hasan filed his request for an ALJ hearing on

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1 Respondents argue that Hasan raised the discovery issue for the first time on a petition for rehearing. That statement is not true. The Tenth Circuit also expressly noted in its opinion that Hasan "contends he was denied discovery." *See* App., p. A4.

February 28, 2000. *See* App., p. A19.[2] Within two weeks, Wolf Creek filed a motion to dismiss Hasan's complaint and a motion for "protective order seeking to preclude discovery until the ALJ ruled on the pending motion to dismiss." *See* Brief of Wolf Creek, p. 2.

The ALJ denied Wolf Creek's motion for protective order and, on April 3, 2000, ordered Wolf Creek to reply to Hasan's discovery requests. *Id.* However, Wolf Creek *never was required to fully answer Hasan's discovery.* Though Wolf Creek did proffer some discovery responses on April 25, 2000, it certainly did not "provide Hasan with comprehensive responses to his discovery requests," as it now claims. *See* Brief of Wolf Creek, p. 3.

Rather, Wolf Creek refused to give Hasan the names and number of civil / structural / pipe-support engineers that it hired at various locations since May 18, 1999. These names and the numbers of positions filled, along with the job advertisement information were precisely the information Mr. Hasan needed in order to allege a *prima facie* case.

The Tenth Circuit missed this point. That court held that Hasan "did not sufficiently allege that respondent took some adverse action against him because of his protected activity." App., p. A6. Specifically, the court held, "Mr.

---

2 The ALJ hearing is a stage of *de novo* review, wherein any findings by OSHA, *e.g.*, findings dismissing Hasan's complaint, are "inoperative" for the duration of the ALJ review. *See, e.g.* 29 C.F.R. § 24.5(d); § 24.4(d)(2).

Hasan failed to allege that a position for which he was qualified was available and that respondent either filled that position or continued to search for applicants for that position after refusing to hire him." *Id.*

The problem with the Tenth Circuit's finding is that the names and information about all civil / structural / pipe-support engineers hired after May 18, 1999, would have revealed whether Wolf Creek filled the position with someone else or continued to search for applicants for the position after rejecting Hasan.

On April 20, 2000, the ALJ issued a show cause order, directing Hasan to submit evidence or offer arguments in support of his claim within thirty days of receipt of Wolf Creek's discovery responses. However, the ALJ *never* made Wolf Creek proffer *pertinent* discovery responses, such as the answers to Hasan's requests for information about engineers hired after May 18, 1999. Absent that information, neither Mr. Hasan nor any other victim of similar retaliatory failure to hire could possibly state a *prima facie* case.

On June 12, 2000, Mr. Hasan filed his response to the ALJ's show cause order. Hasan's response is listed at item number 14 of the DOL's Certified List, which comprises the administrative record in this matter. *See* Brief of Wolf Creek, p. 2, n. 1.

In his response, Mr. Hasan specifically argued that "the respondent is not providing me the entire discovery materials (under 29 C.F.R. Part 18). The respondent is not even providing me copies of all the internet advertisements

pertaining to the hiring of civil / structural / pipe support engineers...this court, for the sake of justice, should order the respondent to provide me all the discovery documents (without redactions) that I am entitled to for the above ERA case." *See* Certified List, No. 14, p. 2.

This pleading directly challenges the sufficiency of Wolf Creek's discovery responses, and Wolf Creek's contrary representation to this Court – at p. 3 of its brief – is misleading at best and, at worst, *patently false*. However, the ALJ never required Wolf Creek to give Mr. Hasan the information he requested and, on October 5, 2000, dismissed Hasan's ERA claim.

What has happened to Mr. Hasan should be a warning to this Court that the ERA could be rendered useless if the DOL and lower courts continue to dismiss ERA complaints without pertinent discovery. These tribunals either misunderstand or misapply the principles this Court recently articulated in *Swierkiewicz*, and the Court should grant *certiorari* to curb this practice in ERA cases, just as it has done in other employment discrimination cases. *See, e.g. Rucker v. Potter*, 123 S.Ct. 465 (2002)(remanding to Ninth Circuit for consideration in light of *Swierkiewicz*).

Respectfully submitted,

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